REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CONSTITUTIONAL PETITION NO. 11 OF 2016

IN THE MATTER OF SECTION 40 (3) OF THE COUNTY GOVERNMENTS ACT O. 17 OF 2012

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 47, 50 (1) AND (2) AND 236 OF THE CONSTITUTION

BETWEEN

MOHAMED DAME SALIM……...……..PETITIONER

AND

THE COUNTY ASSEMBLY

OF TANA RIVER COUNTY……..…..1ST RESPONDENT

THE SELECT COMMITTEE OF THE

COUNTY ASSEMBLY OF TANA RIVER…….….. 2ND RESPONDENT

THE CLERK, COUNTY ASSEMBLY OF TANA RIVER……3RD RESPONDENT

RULING

By his petition dated 6th May, 2016, the petitioner is seeking the following reliefs: -

a) A declaration that section 40 (3) of the County Governments Act, 2012 is inconsistent with Article 50 (1) of the Constitution and is therefore null and void to the extent of the inconsistency.

b) A declaration that the 2nd respondent shall violate the right of the petitioner under Articles 50 (1) by investigating and passing a decision on the matter.

c) An Order of Certiorari to remove and quash the decision of the 1st, 2nd and 3rd respondents to investigate the petitioner contained in the letter dated 4th May, 2016.

d) An Order prohibiting the 1st and 2nd respondents from investigating, summoning for investigations or recommending the removal of the petitioner from office under section 40 (3) of the County Governments Act.

e) Cost of the petition.

The petition was accompanied by a chamber summons application of the same date supported by the petitioner's affidavit. The respondents filed their application brought under certificate of urgency dated 11th May, 2016. The respondents' application seeks the following orders: -

1. THAT the instant application be certified as urgent and the same be heard ex-parte in the first instance.

2. THAT this application be heard ahead of the petitioner's application dated 6th May, 2016.

3. THAT in the interim, this Honourable Court be pleased to vary, vacate, stay and or set aside the Orders granted by the court on the 9th May, 2016 pending the hearing and determination of this application.

4. THAT in the alternative and without prejudice to prayer (3) above, this Honourable Court be pleased to issue a "stop to run/conservatory order" on the ten day statutory period provided for under section 40 (3) of the County Governments Act, 2012 for the Ad Hoc Committee (2nd Respondent/Applicant) to conclude its investigations and deliver its report to the 1st Respondent/Applicant pending hearing and determination of this application.

5. THAT this Honourable Court find that the Petitioner's application dated 6th May, 2016 and the petition therein do raise a substantial question of the law envisaged under Article 165 (3) (d) (i) as read together with Article 165 (4) of the Constitution.

6. THAT this Court be pleased to Order and or direct that the file in the instant matter be placed before the Chief Justice to constitute a suitable bench to handle the matter in terms of Article 165 (4) of the Constitution.

7. THAT the costs of this application be provided for.

8. Any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.

The application is supported by the affidavit of Mohamed H. Dube sworn on 11th May, 2016.

The parties herein agreed to deal with the issues raised by the respondents concerning the referral of the dispute to the Chief Justice to constitute a three Judge bench to hear the matter. Parties further agreed to determine that issue as raised in the respondents' application by way of written submissions.

M/s Musyoki Mogaka Advocates, counsels for the respondents submit that the main issue for the determination of this court is whether or not this matter ought to be referred to the Chief Justice for empanelment of an uneven number of Judges to hear and determine it. Counsels submit that the petitioner's petition is seeking to have section 40 of the County Governments Act be declared as unconstitutional. Articles 165 (4) of the Constitution provides that if a matter raises a substantial question of law, it shall be heard by an uneven number of Judges, being not less than three, assigned by the Chief Justice.

It is further submitted by counsels for the respondents that what amounts to a substantial question of law was defined in the case of **CHUNILAL MEHTA V CENTRUY SPINNING AND MANUFACTURING CO. A.I.R. 1962 S.C.** when the court stated as follows: -

"a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial."

Counsels further rely on the case of **SANTOSH HAZARI VS PURUSHOTTAM TIWAN (2001) 3 S.C.C** where the court stated the following:

"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case if answered either way, insofar as the rights of the parties before it are concerned."

Counsels for the respondents maintain that the issue has also been dealt with by the Kenyan Courts. In the case of **LAW SOCIETY OF KENYA V ATTORNEY GENERAL & 10 OTHERS (2016) EKLR**, Justice Lenaola held that the court's discretion to refer a matter to the Chief Justice for the constitution of an uneven bench should be informed of the following criteria:-

a) Whether the matter is complex.

b) Whether the matter raises a novel point.

c) Whether the matter by itself requires a substantial amount of time to be disposed of.

d) The effect of the prayers sought in the petition.

e)The level of public interest generated by the petition.

The respondents contend that the constitutionality of section 40 (3) of the County Governments Act has been dealt with in two cases namely **STEPHEN NENDELA V COUNTY ASSEMBLY OF BUNGOMA & 4 OTHERS [2014] eKLR** and that of **GEORGE MAINA KAMAU V COUNTY ASSEMBLY OF MURANGA & 2 OTHERS [2016] eKLR.** Counsels submit that whereas Justice Mabeya held in the **SEPHEN NENDELA** case that section 40 (3) of the County Governments Act is unconstitutional, Justice Byram Ongoya held that the section is not unconstitutional in the **GEORGE MAINA KAMAU** (supra) case. This calls for a bench of more than one Judge so that the matter can be determined or the constitution interpreted as two or three minds are always better than one.

M/s Munga Kibanga & Co. Advocates, counsels for the petitioner, opposed the application. Counsels submit that the test to be applied is whether the matter raises a substantial question of law. Article 165 (3) provides that the High Court can certify a matter as one that raises a substantial question if there is a question as to **"whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened"** or where it involves a question regarding **"the interpretation of this constitution including the determination of; (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution…"**

Counsels maintain that the issues relating to the constitutionality of section 40 (3) of the County Governments Act has already been dealt with by the courts in the two cases cited by the respondents' counsels. Counsels rely on the case of **HARRISON KINYANJUI V A.G & ANOTHER (2012) eKLR**, where Majanja J states as follows: -

"The meaning of 'substantial question' must take into account the provisions of the constitution as a whole and need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge has authority under article 165 of the constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of the article 165 (4) the decisions of a three judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges".

It is also submitted that in the case of **PHILIP K. TUNOI & ANOTHER V JUDICIAL SERVICE COMMISSION & ANOTHER (2015) eKLR, Petition number 244 of 2014,** Justice Odunga dealt with the issue of substantial question of law and stated as follows: -

"My view is informed by the fact that the mere fact that a numerically superior bench is empaneled whose decision differs from that of a single judge does not necessarily overturn the single judge's decision. To overturn a decision of a single judge one would have to appeal to the court of appeal. Similarly appeals from decisions of numerically superior benches go to the Court of Appeal … it is clear that the only constitutional provision that expressly permits the constitution for a bench of more than one High Court Judge is Article 165 (4). Under that provision, for the matter to be referred to the Chief Justice for the said purpose, the High Court must certify that the matter raises a substantial question of law …"

According to counsels for the petitioner, there is no substantial question of law being raised by the petition. Other cases have dealt with the issue. The request by the respondents will lead to unnecessary delay of the hearing and determination of the matter.

Article 165 (4) provide as follows: -

Any matter certified by the court as raising substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

It is established that there is no clear definition of the term *"substantial question of law"*. Most of the cases filed in court raises substantial questions of law. In the case of **CHUNILAL V MEHTA & SONS LTD V THE CENTURY SPINNING & CO.** (supra), the appeal arose because the High Court had held that although the question of interpreting an agreement was a question of law, it was not a substantial question of law as required by Article 13 (1) of the Indian Constitution. The Supreme Court of India held that the matter raised a substantial question of law and that the appellants were entitled to be allowed to file an appeal. This shows that each case has to be determined on its own merit. Judicial Officers deal with questions of law on daily basis. What is important is for the specific Judge to ask himself or herself whether the issue in dispute can be effectively dealt by a single judge or whether there is need to empanel the bench.

The two Indian cases cited herein have tried to explain the term substantial questions of law. In the case of **SANTOSHI HAZARI V PURUSHOTTAM TIWARI** (supra), citing the case of **RIMMALAPUDI SUBBA RAO V NOONY VEERAJU, ILR, 1992, Madras, 264,** the court states the following: -

..when a question of law is fairly arguable, where there is room for difference of opinion on it or where the court thought it necessary to deal with that question at some length and discuss alternative view, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law.

The court went on to state as follows: -

> ***The proper test for determine whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law.***
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> ***Appoint of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.***

There is the crucial ingredient of whether the issue has been finally settled by the highest court. If the Supreme Court or the Court of Appeal have made a decision on a particular matter; the High Court will be bound to follow such a decision. There is no such decision of the two courts relating to this issue of section 40 (3) of the County Governments Act.

There is also an aspect of the complexity of the issue being raised. This is purely discretionary on the part of the judge. If a judge feels that he/she can deal with an issue, however complex it might be, then it will be handled by that judge. There is no requirement that the Chief Justice can unilaterally empanel a bench on a matter pending before a single judge without the certification of the single judge that the matter raises a substantial point of law.

There is the test of whether the matter is of general public importance. It is quite difficult to base a decision to refer a matter for the empanelment of a bench based on this yardstick. Nowadays members of the public are interested in almost every suit filed in court. A simple murder case can raise public interest. All issues relating to the interpretation of the Constitution raises public interest. Issues involving gender, rights of disabled and minorities raise public interest. An issue might raise public interest yet it does not raise any substantial question of law. My views is that this yardstick cannot stand alone.

My brother, Justice Lenaola included the criteria as to whether the matter raises a novel point. This can be a good guideline at times. However, a judge might be of the view that since the point of law being raises has not been dealt with, he or she would be glad to deal with such an issue alone so that his/her legal thought can come out. Instead of the matter being handle by more than one judge.

I have noted the sentiments by Justices Majanja and Odunga on the issue of the weight of a judgement of a single High Court judge vis-a-vis that of a panel of three or more judge. The leeway to have a matter heard by more than one judge is provided for under Article 165 (4) of the Constitution. The Constitution envisaged that an issue will arise in court that will require to be determined by more than one High Court Judge. The best way forward is for the litigants to pursue such cases upto the Court of Appeal or the Supreme Court. It is true that a three judge bench of the High Court is not binding on a fellow single High Court judge. However, where the decision is made by such a bench, it can be persuasive. A single

judge will have to give a contrary opinion on the matter that is totally different from that of his colleagues.

Turning to the issue at hand, the petitioner would like this court to hold that section 40 (3) of the County Governments Act is unconstitutional as it goes against the provisions of Article 50 of the Constitution on fair hearing. The issue is not novel. It was dealt with by Justice Mabeya in the case of **STEPHEN NENDELA** (supra). Justice Byram Ongaya dealt with the same issue in the case of **GEORGE MAINA KAMA** (supra). The same judge dealt with the same issue in the case of **RICHARD BWOGO BIRIR V NAROK CUNTY GOVERNMENT & 2 OTHERS [2014] eKLR**. There is no decision of the Court of appeal on this matter. I have personally dealt with the matter in Malindi Constitutional Petition number 10 of 2016, **AMINA RASHID MASOUD V THE GOVERNOR, LAMU COUNTY & OTHERS**. The case is pending ruling.

In view of the fact that we have forty seven (47) County Governments in Kenya, courtesy of our 2010 Constitution and in view of the fact that members of the County Assembly have been ready and willing to exercise their powers provided under section 40 (3) of the County Government Act, I do hold that it would be prudent if a panel of three or more High Court judges can deal with the matter. There is also the inherent issue as to whether such cases belong to the High Court or the Employment and Labour Court. As noted herein, Justice Mabeya of the High Court dealt with one case while Justice Byram Ongayo of the employment and Labour Court dealt with two. My view is that a decision of a bench of more than one judge is ideal in the circumstances.

I do therefore find that the application dated 11th May, 2016 by the respondents is merited and is hereby allowed in terms of prayer five (5). It will only be fair to maintain the interim order in place before the uneven bench is formed taking into account the fact that currently there is no sitting Chief Justice who can form the bench.

In the end, I am satisfied that the issues raised in the petition raises substantial question of law as envisaged under article 165 (4) of the Constitution. This matter is hereby referred to the Chief Justice to constitute an uneven bench to deal with the petition. In the meantime, the interim orders are hereby extended until the date when the matter shall be mentioned before the bench of three or more judge. Further, in view of the fact that I will make a ruling in petition number 10 of 2016 which relates to a similar dispute, I hereby recuse myself from the bench to be formed by the incoming Chief Justice. Costs shall follow the outcome of the petition.

Dated and delivered in Malindi this 7th day of September, 2016.

S.J. CHITEMBWE

JUDGE